

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 99-F-01

Date issued: January 6, 1999

Requested by: Senator Tim Mathern

- QUESTION PRESENTED -

Whether North Dakota law prohibits the withholding or withdrawal of artificial nutrition or hydration except as provided in N.D.C.C. § 23-06.4-06.1.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that under North Dakota law a competent adult may refuse medical treatment, including artificial nutrition or hydration; that the person authorized by law to provide informed consent for health care for minor or incapacitated patients may refuse on behalf of the patient artificial nutrition or hydration; that nutrition and hydration must be withheld or withdrawn if a terminally ill patient has previously declared in writing the patient's desire that nutrition or hydration be withdrawn or withheld; that artificial nutrition or hydration may be withdrawn or withheld from a terminally ill patient if the requirements of N.D.C.C. § 23-06.4-06.1(3) are satisfied; and, if permitted by the durable power of attorney for health care, the agent of an incapacitated person may authorize the withholding or withdrawal of nutrition or hydration.

- ANALYSIS -

N.D.C.C. § 23-06.4-06.1, discussed in more detail later, identifies conditions for withdrawing, withholding, and administering nutrition and hydration from or to an incapacitated person in a terminal condition. A number of other North Dakota statutes also address how health care decisions are to be made for minors or incapacitated adults. Furthermore, the common law and United States Constitution protect a competent person's right to make medical decisions, including the right to refuse unwanted medical treatment. The constitutional right to refuse unwanted medical treatment and the different statutory rights provided in North Dakota law must be read together and harmonized.

The Right to Refuse Medical Treatment.

The United States Supreme Court has held that the right to refuse medical treatment is an aspect of liberty that exists without statutory authority. Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990). Even prior to Cruzan, decisions of the United States Supreme Court indicated "that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment." Id. at 278. Numerous state courts have also held that a competent individual has a right to refuse treatment. In fact, the existence of a right to refuse medical treatment has "received almost universal recognition." McConnell v. Beverly Enters. - Conn., Inc., 553 A.2d 596, 603 (Conn. 1989). "[M]ost courts have based a right to refuse treatment either solely on the common-law right to informed consent or on both the common-law right and a constitutional privacy right." Cruzan, 497 U.S. at 271. For a review of the legal foundation for the right to refuse medical treatment, see Developments in the Law -- Medical Technology and the Law, 103 Harv. L. Rev. 1519, 1661-76 (1990); Edward J. O'Brien, Note, Refusing Life-Sustaining Treatment: Can We Just Say No?, 67 Notre Dame L. Rev. 677, 679-88 (1992).

In Cruzan the Supreme Court assumed "that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." Id. at 279. Justice O'Connor noted in her concurrence:

Artificial feeding cannot readily be distinguished from other forms of medical treatment. . . . A gastrostomy tube . . . must be surgically implanted in the stomach or small intestine. . . . Requiring a competent adult to endure such procedures against her will burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment. Accordingly, the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water.

Id. at 288-89 (O'Connor, J., concurring).

"Courts overwhelmingly have held that a person may refuse or remove artificial life-support, whether supplying oxygen by a mechanical respirator or supplying food and water through a feeding tube." In re Browning, 568 So.2d 4, 11-12 (Fla. 1990). "Analytically,

artificial feeding by means of a nasogastric tube or intravenous infusion can be seen as equivalent to artificial breathing by means of a respirator. Both prolong life through mechanical means when the body is no longer able to perform a vital bodily function on its own." In re Conroy, 486 A.2d 1209, 1236 (N.J. 1985). As explained in the Harvard Law Review: "Following apparent consensus in the medical community, most courts have held that when food and water are provided medically through tubes, such provision is medical treatment and may be withdrawn to the same extent as other medical treatment." Developments in the Law -- Medical Technology and the Law, 103 Harv. L. Rev. 1519, 1657-58 (1990).¹

¹ For cases that expressly or impliedly hold that the right to refuse medical treatment encompasses the right to refuse artificial nutrition or hydration, see Gray ex rel. Gray v. Romeo, 697 F. Supp. 580, 587 (D.R.I. 1988) ("If a person has a right to decline life on a respirator, (citation omitted) then a person has the equal right to decline a gastrostomy tube."); Rasmussen ex rel. Mitchell v. Fleming, 741 P.2d 674 (Ariz. 1987); Donaldson v. Van de Kamp, 4 Cal. Rptr.2d 59 (Cal. App. 1992) (right to refuse life-sustaining treatment includes hydration and nourishment); McConnell v. Beverly Enters. - Conn., Inc., 553 A.2d 596, 603 (Conn. 1989) ("The applicable case law has by and large concluded that, as a constitutional matter, there is no logical distinction between removal of a respirator and removal of a gastrostomy tube."); In re Browning, 568 So.2d 4 (Fla. 1990) (finding no legal distinction between supplying oxygen by a mechanical respirator or supplying food and water through a feeding tube); In re Estate of Greenspan, 558 N.E.2d 1194 (Ill. 1990); In re Schmidt, 699 N.E.2d 1123, 1128 (Ill. App. 1988) ("a guardian acting as surrogate may exercise the patient's right to refuse medical treatment including artificial nutrition and hydration"); In re Lawrence, 579 N.E.2d 32, 41 (Ind. 1991) ("artificial nutrition and hydration is treatment that a competent patient can accept or refuse"); DeGrella ex rel. Parrent v. Elston, 858 S.W.2d 698 (Ky. 1993); In re Gardner, 534 A.2d 947 (Me. 1987) (nutrition and hydration indistinguishable from other life-sustaining procedures); Mack v. Mack, 618 A.2d 744 (Md. 1993) (treatment includes artificial nutrition and hydration); Guardianship of Doe, 583 N.E.2d 1263, 1267 n.11 (Mass. 1992) ("Courts generally consider artificial hydration and nutrition, by nasoduodenal or gastrostomy tube, medical treatment."); Brophy v. New England Sinai Hosp., Inc., 497 N.E.2d 626 (Mass. 1986); In re Peter, 529 A.2d 419 (N.J. 1987) ("there is no objective distinction between withdrawal or withholding of artificial feeding and any other medical treatment"); In re Conroy, 486 A.2d 1209 (N.J. 1985); Delio v. Westchester County Med. Ctr., 516 N.Y.S.2d 677 (N.Y. App. Div. 1987); In re Fiori, 673 A.2d 905 (Pa. 1996); In re Grant, 747 P.2d 445 (Wash. 1987) (right to withhold life

N.D.C.C. § 23-06.4-06.1 cannot reasonably be read to infringe on the constitutional right of a competent adult to refuse hydration or nutrition. The right to refuse medical treatment is an aspect of liberty that exists independent of state law, and state law cannot improperly infringe on that right. Furthermore, the intent of N.D.C.C. ch. 23-06.4 is not to infringe on the right to refuse treatment. N.D.C.C. § 23-06.4-01 specifically provides that "[e]very competent adult has the right and the responsibility to control the decisions relating to the adult's own medical care, including the decision to have medical or surgical means or procedures calculated to prolong the adult's life provided, withheld, or withdrawn." N.D.C.C. ch. 23-06.4 also specifically states it does not affect a competent patient's right to make decisions regarding life-prolonging treatment or medical care. N.D.C.C. §§ 23-06.4-07(1), 23-06.4-11(5).

N.D.C.C. § 23-06.4-06.1 cannot be read to provide the exclusive conditions when nutrition or hydration can be withheld. Such a reading could unconstitutionally infringe on a competent person's constitutional right to refuse unwanted medical treatment. When possible, statutes should be interpreted to be constitutional. Ash v. Traynor, 579 N.W.2d 180 (N.D. 1998). To read N.D.C.C. § 23-06.4-06.1 to provide the exclusive conditions when nutrition or hydration can be withheld also conflicts with N.D.C.C. § 23-06.4-01, which provides that competent adults have the right to refuse unwanted medical treatment. Statutes should be harmonized when possible. Lucier v. N.D. Workers Comp. Bureau, 556 N.W.2d 56 (N.D. 1996) (statutes on the same subject should be harmonized); Johnson v. Johnson, 527 N.W.2d 663 (N.D. 1995) (statutes should be read in relation to other statutes involving similar subject matter to harmonize statutory scheme); Van Raden Homes Inc. v. Dakota View Estates, 520 N.W.2d 866 (N.D. 1994) (statutes should be harmonized without rendering one or the other useless). Finally, a broad reading of N.D.C.C. § 23-06.4-06.1 is not logical. Such a reading would mean a competent, terminally ill adult cannot choose to have hydration or nutrition withdrawn, but a competent person can declare the person wants hydration and nutrition withdrawn if the person becomes incapacitated and terminally ill in the future. Statutes should be construed in a logical manner. Fireman's Fund Mortg. Corp. v. Smith, 436 N.W.2d 246 (N.D. 1989) (should attempt to construe statutes in a logical manner); Frost v. N.D. Dept. of

sustaining treatment includes right to withhold artificial means of nutrition and hydration); In re Edna M.F., 563 N.W.2d 485 (Wis. 1997); In re L.W., 482 N.W.2d 60 (Wis. 1992) (right to refuse unwanted life-sustaining medical treatment extends to artificial nutrition and hydration).

Transp., 487 N.W.2d 6 (N.D. 1992) (statutes should be construed to avoid a ludicrous result).

It is my opinion a competent adult has a protected liberty interest in refusing unwanted medical treatment and that the refusal of artificially delivered food and water is encompassed within that liberty interest. Accordingly, nutrition or hydration may be withheld or withdrawn at the request of a competent adult.

Health Care Decisions for Incapacitated Persons.

N.D.C.C. § 23-12-13 establishes a prioritized list of persons who are authorized to make health care decisions for a minor patient or for an incapacitated patient. With regard to adults, the statute is operative when an attending physician determines the patient is an incapacitated person. An incapacitated person is one who is impaired to the extent the person is unable to make or communicate responsible decisions concerning health care. N.D.C.C. §§ 23-12-13(1), 30.1-26-01(2). Thus, if a patient is a minor or is incapacitated, health care decisions will be made by the authorized person. See N.D.C.C. § 23-12-13(1)(a)-(i).

A person authorized to consent to health care on behalf of an incapacitated person must first determine that the patient, if not incapacitated, would consent to the proposed health care. N.D.C.C. § 23-12-13(3).² If such a determination cannot be made, the authorized person may consent to health care based upon what the person deems is in the patient's best interest. Id.

As previously discussed, health care decisions include whether nutrition or hydration will be withdrawn, withheld, or administered. The language of N.D.C.C. § 23-12-13 does not prohibit the authorized person from consenting to nutrition or hydration being withheld or withdrawn.³ Accordingly, it is my opinion N.D.C.C. § 23-12-13

² Cruzan held a state is constitutionally entitled to establish a procedural safeguard to assure that a decision by a surrogate to exercise the right to refuse life-saving hydration or nutrition conforms to the incompetent patient's wishes. 497 U.S. at 279-81. The North Dakota Legislature has not provided procedural safeguards to assure the decision of the person authorized to provide informed consent acts in accordance with the incapacitated patient's wishes.

³ N.D.C.C. § 23-12-13 prohibits the person authorized to provide informed consent from consenting to certain procedures without a court order. It does not prohibit the authorized person from consenting to nutrition or hydration being withheld or withdrawn. In

permits the authorized person to decide, based upon the criteria established in subsection 3, whether nutrition or hydration will be withdrawn, withheld, or administered to the patient.

Uniform Rights of Terminally Ill Act.

North Dakota law establishes two statutory mechanisms to enable adults to retain control over their own medical care during periods of incapacity. N.D.C.C. ch. 23-06.4 gives effect to an incapacitated terminally ill patient's prior written directions (living will) regarding the use of life-prolonging treatment. The chapter does not affect, impair, or supercede the right of a competent patient to make decisions regarding the use of life-prolonging treatment or the withdrawal of medical care. N.D.C.C. §§ 23-06.4-07(1), 23-06.4-11(5). A living will is operative only if a person is terminally ill and "no longer able to make decisions regarding administration of life-prolonging treatment." N.D.C.C. § 23-06.4-04.

N.D.C.C. § 23-06.4-03(3) sets forth a statutory form which "must be substantially" followed for a living will to be a "declaration" as defined in N.D.C.C. § 23-06.4-02(2). A "declaration" functions as "presumptive evidence of the declarant's desires concerning the use, withholding, or withdrawal of [life-prolonging] treatment and must be given great weight by the physician in determining the intent of the incompetent declarant." N.D.C.C. § 23-06.4-04.

As used in N.D.C.C. ch. 23-06.4, "life-prolonging treatment" means "any medical procedure, treatment, or intervention that, when administered to a qualified patient, will serve only to prolong the process of dying and where, in the judgment of the attending physician, death will occur whether or not the treatment is utilized." N.D.C.C. § 23-06.4-02(4). The definition of "life-prolonging treatment" specifically excludes "the provision of appropriate nutrition and hydration." Id. See also N.D.C.C. § 23-06.4-06.1(1) ("nutrition or hydration appropriately administered is not life-prolonging treatment").

Although nutrition and hydration are not considered "life-prolonging treatment" under N.D.C.C. ch. 23-06.4, an individual can make a declaration governing the use, withholding, or withdrawal of nutrition or hydration. N.D.C.C. § 23-06.4-03(1). N.D.C.C. § 23-06.4-06.1 addresses when nutrition or hydration may be

her concurring opinion in Cruzan, Justice O'Connor stated the Constitution may require a state to give effect to the medical decisions of a surrogate decision maker. 497 U.S. at 289.

withdrawn, withheld, or administered. Subsection 2 of section 23-06.4-06.1 provides:

Nutrition or hydration, or both, must be withdrawn, withheld, or administered if the patient for whom the administration of nutrition or hydration is considered has previously declared in writing the patient's desire that nutrition or hydration, or both, be withdrawn, withheld, or administered.

Subsection 3 provides:

In the absence of a written statement concerning nutrition or hydration, nutrition or hydration, or both, may be withdrawn or withheld if the attending physician has determined that the administration of the nutrition or hydration is inappropriate because the nutrition or hydration cannot be physically assimilated by the patient or would be physically harmful or would cause unreasonable physical pain to the patient.⁴

The statutory form for a living will specifically provides a section for the declarant to make a declaration regarding the declarant's wishes to receive or not receive nutrition or hydration. See N.D.C.C. § 23-06.4-03(3)(b), (c).

Durable Power of Attorney for Health Care Act.

The Legislature has also enacted the Durable Power of Attorney for Health Care Act, N.D.C.C. ch. 23-06.5, which is another mechanism for

⁴ It could be argued subsection 3 prescribes the only conditions for withholding artificial nutrition or hydration absent an appropriate declaration. However, N.D.C.C. § 23-06.4-06.1 is a part of N.D.C.C. ch. 23-06.4 and must be read in context. Nothing suggests N.D.C.C. § 23-06.4-06.1 may be applied outside the confines of N.D.C.C. ch. 23-06.4. N.D.C.C. § 23-06.4-06.1 must also be harmonized with the Constitution and related statutes. See supra at 4. N.D.C.C. § 23-06.4-06.1(3) does not unambiguously state it prescribes the only conditions for withholding artificial nutrition or hydration absent a declaration. Absent such language, it is contrary to sound principles of statutory construction to interpret subsection 3 to so provide.

making health care decisions on behalf of an incapacitated patient.⁵ "The purpose of [N.D.C.C. ch. 23-06.5] is to enable adults to retain control over their own medical care during periods of incapacity through the prior designation of an individual to make health care decisions on their behalf." N.D.C.C. § 23-06.5-01. Pursuant to N.D.C.C. ch. 23-06.5, an adult, referred to as the "principal," may execute a durable power of attorney for health care giving another adult, referred to as the "agent," the authority to make health care decisions. "'Health care decision' means consent to, refusal to consent to, withdrawal of consent to, or request for any care, treatment, service, or procedure to maintain, diagnose, or treat an individual's physical or mental condition." N.D.C.C. § 23-06.5-02(5).

The statutory form of durable power of attorney contains the instruction that "this document gives [the principal's] agent the power to consent to [the principal's] doctor not giving treatment or stopping treatment necessary to keep [the principal] alive." N.D.C.C. § 23-06.5-17. The agent "has the authority to make any and all health care decisions on the principal's behalf that the principal could make." N.D.C.C. § 23-06.5-03(1). The only constraint is that the agent, after consultation with health care providers, has to make decisions in accordance with the principal's wishes and beliefs or, if unknown, in accordance with the "agent's assessment of the principal's best interests." N.D.C.C. § 23-06.5-03(2).⁶

N.D.C.C. ch. 23-06.4 only limits an agent's authority under N.D.C.C. ch. 23-06.5 if a conflicting declaration was made after the durable power of attorney was executed. "To the extent a durable power of attorney for health care conflicts with a declaration executed in accordance with chapter 23-06.4, the instrument executed later in

⁵ Neither N.D.C.C. ch. 23-06.4 nor N.D.C.C. ch. 23-06.5 condone, authorize, or approve mercy killing, euthanasia, or assisted suicide or permit any affirmative or deliberate act or omission to end life other than to permit the natural process of dying. N.D.C.C. §§ 23-06.4-01, 23-06.5-01. N.D.C.C. § 23-06.4-11(1) specifically provides that "[d]eath resulting from the withholding or withdrawal of . . . nutrition, or hydration pursuant to a declaration and in accordance with this chapter does not constitute, for any purpose, a suicide or homicide." There is an important and logical distinction between assisted suicide and withdrawing life-sustaining treatment. See Vacco v. Quill, 117 S. Ct. 2293 (1997).

⁶ This is essentially the same standard that authorized persons are to apply in providing informed consent to health care under N.D.C.C. § 23-12-13. See N.D.C.C. § 23-12-13(3).

time controls." N.D.C.C. § 23-06.5-13(2). By specifically addressing potential conflicts between a declaration and durable power of attorney for health care, the Legislature recognized that the same health care decisions made in a declaration under chapter 23-06.4 can also be made by an agent. This necessarily includes the decision to withhold, withdraw, or administer nutrition or hydration.

An agent has authority to make "any and all health care decisions on the principal's behalf that the principal could make." A principal could make the health care decision whether to withhold, withdraw, or administer artificial nutrition or hydration. Accordingly, it is my opinion that, if not prohibited by the durable power of attorney for health care, the agent of the principal may authorize withholding or withdrawal of artificial nutrition or hydration.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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